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No. 96-1037

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KIOWA TRIBE OF OKLAHOMA,
Petitioner,
v.
MANUFACTURING TECHNOLOGIES, INC.,
Respondent.

On Writ of Certiorari to the Oklahoma Court of Appeals

BRIEF AMICI CURIAE OF THE ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, HO-CHUNK NATION, NOTTAWASEPPI HURON BAND OF POTAWATOMI INDIANS, STANDING ROCK SIOUX TRIBE, CONFEDERATED TRIBES OF THE COLVILLE RESERVATION, AND ST. CROIX CHIPPEWA INDIANS OF WISCONSIN IN SUPPORT OF PETITIONER

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32 pp

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

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INTEREST OF AMICI [1]

Each of the Amici Tribes is a federally recognized Indian tribe responsible for providing a broad range of governmental services in areas such as education, health care, employment, housing, environmental protection, nat-

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[1] Pursuant to Rule 37.6 of the Rules of this Court, counsel for Amici states that no counsel for a party authored this brief in whole or part, and that no person or entity other than Amici and their counsel made any monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief amici curiae, and those consents have been filed with the Clerk.

ural resource management, and law enforcement to Indians and other people living on and near their reservations. Each faces tremendous challenges in carrying out these duties. For each of these tribes, the size [2] and location [3] of its reservation has resulted in significant

[2] For example, the Ho-Chunk Nation has 5779 members and only 845.23 acres of trust land scattered over 14 Wisconsin counties. According to tribal census records, it had 22.5% unemployment in 1990, while unemployment among all Wisconsin residents was 4.4%. In 1995, 64% of Ho-Chunk households had incomes less than 50% of the median county income. The St. Croix Chippewa Indians of Wisconsin is similarly situated. It occupies only 3,000 acres of land that are dispersed across three Wisconsin counties, and is responsible for providing services to approximately 3500 member and non-member Indians. As reported by the 1990 U.S. Census, Indians at St. Croix had median household incomes of $14,500, with only 29% owning homes, while the median household income for all Wisconsin residents was $28,000, with 67% owning homes. Similarly, the Nottawaseppi Huron Band of Potawatomi Indians holds only 120 acres of land as a reserve in Michigan. The Band has 612 members with 25% unemployment.

[3] The isolated locations of the reservations occupied by the Standing Rock Sioux Tribe, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, and the Confederated Tribes of the Colville Reservation, have left each with unemployment and poverty rates that are two to four times the national average, with correspondingly higher deficits in health and education. For example, as of 1990 the median household income for all persons nationwide was $30,056, with only 13.1% of the U.S. population living below the poverty level. *See* Indian Health Service, *Regional Differences in Indian Health 1995*, at 27. But for Indians within the Aberdeen Area of the Bureau of Indian Affairs, including those on the Standing Rock Sioux Reservation, the median household income was $12,310, with 49.6% living below the poverty level. *Id.* For Indians within the Billings Area, including those on the Fort Peck Reservation, median household income was $14,249 with 44.6% living in poverty. *Id.* And for Indians within the Portland Area, including those at Colville, the median income was $21,123, with 29.2% living in poverty. *Id.* Nationwide, the unemployment rate among men in 1990 was 6.4%, but among Indian men within the Aberdeen Area the rate was 26.5%, and within Billings, 29.8%. *Id.* at 26. The health problems affecting Indian people are evidenced in part by comparison of mortality rates. During the period 1990-1992, the age adjusted mortality rate for all races nationwide was 513.7 per 100,000 persons, while the rate among Indians was 1048.7 within the Aberdeen Area, and 896.2 within the Billings Area. *Id.* at 45.

barriers to its ability to foster economic development on the reservation, and has left a legacy of high levels of unemployment and poverty, inadequate housing, poor health, and lack of educational opportunity.

To address these problems, all Amici Tribes have undertaken to establish business and economic activities on their reservations that will enable the tribes to provide the facilities and services necessary to meet the needs of their citizens. This has become all the more important as federal spending on programs for American Indians has declined [4]—putting greater pressure on tribes to develop sources of revenue from which to fund these governmental responsibilities.

Moreover, for each of these tribes, many goods and services required for fundamental government operations are simply unavailable on the reservation. Tribes must go outside of Indian country to acquire essential commodities—vehicles for law enforcement, medical supplies, or office equipment. In fact, for most tribes even basic banking services cannot be secured on the reservation. As a result, all Amici Tribes have found it necessary to contract for financing, goods, or services with non-Indians whose places of business lay outside Indian country. These contracts include agreements with off-reservation entities made under the authority of the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450 *et seq.*

In the negotiation of such contracts, all Amici Tribes have discussed and agreed upon terms regarding remedies

[4] Library of Congress Congressional Research Service, Memorandum to the U.S. Senate Committee on Indian Affairs on Indian-Related Federal Spending Trends, at CRS-11 (April 15, 1996).

in the event of breach. These have included waivers of sovereign immunity that specifically define the scope of the waiver—including the remedies available, the choice of law, the forums in which the claim may be enforced, and the property from which a judgment might be satisfied. Such waivers are expressly stated, knowingly made, and the product of negotiation by the parties. As a result, both parties to the contract enter into it with full knowledge of their respective rights, remedies and risks.

All Amici Tribes have an interest in the rules governing tribal sovereign immunity, as their ability to carry out their governmental responsibilities is directly affected by the costs of defending against lawsuits in forums to which they have not consented and the risk of being subject to liability that they had not anticipated and for which they have no protection.

Amici Tribes file this brief to urge the Court to apply this Court's prior decisions that Indian tribes retain their sovereign immunity from suit absent an express waiver by the tribe or Congress, and that the state courts lack jurisdiction over a tribe that has not waived its immunity.

STATEMENT OF THE CASE

The Oklahoma Court of Appeals affirmed a judgment for damages entered against the Kiowa Tribe on a promissory note in which the Tribe had expressly reserved its sovereign rights.[5] In so ruling, the Court recognized that the Kiowa Tribe had "not waived its sovereign rights," but held that because aspects of the transaction occurred outside Indian country[6] the state court had "jurisdiction

[5] The note in a section titled "Waivers and Governing Law" recited that "Nothing in this Note subjects or limits the sovereign rights of the Kiowa Tribe of Oklahoma." Ex. A to Petition on Promissory Note, at 2, in *Manufacturing Technologies, Inc. v. Kiowa Tribe*, No. CJ 93-6523 (District Court, Oklahoma County).

[6] While the opinion does not describe the facts on which the Court based this conclusion, the note recites that it was executed

to hear a claim and enter a judgment for damages against" the Tribe. Pet. App. at 2-4, *Manufacturing Technologies, Inc. v. Kiowa Tribe of Oklahoma*, No. 86,489 (Okla. App. June 28, 1996).

The Court based its assumption of jurisdiction over the Tribe on prior decisions of the Oklahoma Supreme Court, *Hoover v. Kiowa Tribe of Oklahoma*, 909 P.2d 59 (Okla. 1995), *cert. denied*, 116 S.Ct. 1675 (1996), and *First National Bank in Altus v. Kiowa, Comanche, and Apache Intertribal Land Use Committee*, 913 P.2d 299 (Okla. 1996). The Court found that the making of the promissory note constituted an off-reservation activity of the Tribe and held that the note was enforceable against the Tribe in state court because the state's law allowed breach of contract actions to be asserted against the state. Pet. App. at 3, 4. The Court further ruled that state jurisdiction exists unless "expressly prohibited by Congress," and that the assertion of state jurisdiction to enter a judgment of damages against an Indian tribe "does not infringe on tribal self-government." Pet. App. at 3. Since then, the Oklahoma Supreme Court has reaffirmed the rule stated in *Hoover*, and held that the questions of tribal sovereign immunity and the state's jurisdiction over Indian tribes are controlled by "state law." *Aircraft Equipment Company v. Kiowa Tribe of Oklahoma*, 921 P.2d 359, 361, 362 (Okla. 1996).

SUMMARY OF ARGUMENT

The decision below is a radical departure from three fundamental and well established principles of federal Indian law that this Court has never questioned: *first*, that the existence of a tribe's sovereign immunity is controlled exclusively by federal law, *Santa Clara Pueblo v. Martinez*,

by the Tribe within Indian country at the Tribe's offices in Carnegie, Oklahoma, with payments to be made at the lender's offices outside of Indian country. Ex. A to Petition on Promissory Note at 1.

436 U.S. 49, 58 (1978); *second*, that only an unequivocal statement by Congress or the tribe is effective to waive the tribe's sovereign immunity from suit, *id.*; *Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 165, 172-73 (1977); and *third*, that state courts lack jurisdiction over Indian tribes, *Bryan v. Itasca County*, 426 U.S. 373, 388-89 (1976).

The Oklahoma Court of Appeals turned each of these bedrock principles of federal Indian law on its head, and replaced them with an unprecedented test under which: the state courts presumptively possess civil jurisdiction over Indian tribes; the existence of a tribe's immunity from suit is a question of state—not federal—law; and the federal law rule requiring an express waiver of immunity is supplanted by one under which even an express reservation of sovereign rights may be irrelevant to the existence of the immunity. This test cannot be reconciled with established federal law or the policies that federal law is intended to effect.

If the decision were allowed to stand, the rule would have devastating consequences for Indian tribes. A tribe's access to basic goods and services that are unavailable within Indian country would be held hostage to the tribe's waiver of its sovereign immunity to suits in state court, a result prohibited by this Court's decision in *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877 (1986). Innumerable lawsuits would be initiated in state court against Indian tribes simply upon an allegation that some aspect of the transaction occurred outside Indian country. Tribes, most of which have no choice but to keep tribal funds in off-reservation banks, would be compelled to appear and defend, and the purpose of the immunity—to protect the sovereign from the burden of litigation to which it has not consented—would be obviated. The cost of defending against these actions would drain tribal treasuries, divert tribal assets and resources from providing essential government services to Indian people, and undermine the decades of federal law and policy that have

sought to promote tribal self-determination and economic development. Moreover, all of these effects would be felt directly on the reservations.

None of this is necessary. The problem presented by this case is easily avoided by application of the existing rules of federal law. Under these simple rules, persons seeking to contract with Indian tribes may ensure that they have enforceable remedies against the tribe by negotiating for and obtaining an appropriate waiver of tribal immunity in the text of the contract itself.

The decision of the Oklahoma Court of Appeals should be reversed.

ARGUMENT

I. UNDER SETTLED RULES OF FEDERAL LAW, TRIBES ARE IMMUNE FROM SUIT ABSENT AN ACT OF CONGRESS OR THE TRIBE'S EXPRESS WAIVER OF THAT IMMUNITY, AND STATES LACK JURISDICTION OVER TRIBES THAT HAVE NOT WAIVED THEIR IMMUNITY.

A. Tribal sovereign immunity, as an aspect of a tribe's inherent sovereignty, is protected by federal law and may only be waived by Congress or the tribe.

Tribal sovereign immunity is defined and controlled by federal law. *See Oklahoma Tax Comm'n v. Graham*, 489 U.S. 838, 841 (1989). As this Court has repeatedly made clear, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505, 509-11 (1991); *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940); *Turner v. United States*, 248 U.S. 354, 358 (1919). A tribe's sovereign immunity is an "aspect of tribal sovereignty," *Santa Clara Pueblo*, 436 U.S. at 58, rooted in

the unique relationship between the United States and the tribes. This immunity "is a necessary corollary to Indian sovereignty and self-governance." *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986).

Because immunity is an aspect of a tribe's sovereignty, recognized by federal law, the power to limit or waive that immunity is vested exclusively in Congress and the tribe. *Santa Clara Pueblo*, 436 U.S. at 58-59; *Puyallup Tribe v. Washington Dep't of Game*, 433 U.S. 165, 172-73 (1977); *Fidelity & Guaranty Co.*, 309 U.S. at 512. The states have no power in this regard. To the contrary, "in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States." *Three Affiliated Tribes* v. *Wold Engineering*, 476 U.S. 877, 891 (1986). The "suability of the United States and the Indian Nations . . . depends upon affirmative statutory authority. Consent alone gives jurisdiction to adjudge against a sovereign. Absent that consent, the attempted exercise of judicial power is void." *Fidelity & Guaranty Co.*, 309 U.S. at 514.

The lower court reached the opposite conclusion, and decided that a tribe's immunity from suit could be decided by application of "state law" rather than federal law by relying on other state court decisions that incorrectly extended the comity principles of *Nevada v. Hall*, 440 U.S. 410 (1979), to Indian tribes. *Nevada v. Hall* is inapplicable here. The question decided in *Nevada v. Hall* was whether the Constitution required that the California courts give effect to limits imposed by Nevada on its waiver of sovereign immunity, for a tort action involving a Nevada official brought in California by California residents arising out of a traffic accident occurring there. The Court held that nothing in the text or framework of the Constitution regarding the relationship between the states required California to give effect to the Nevada official's immunity. 440 U.S. at 418-27. Rather, based

on the plan of the Constitution and intent of the Framers, the Court found that as between the states, questions of whether to recognize the sovereign immunity of a sister state with regard to tort claims[7] was a matter of comity to be resolved by the states. Thus, California could determine the existence of the Nevada official's immunity by application of California law.

The very constitutional framework that permitted the Court, in *Nevada v. Hall*, to allow principles of comity to control questions of sovereign immunity between the states precludes application of those comity principles to matters involving Indian tribes. Indian tribes "are not States, and the differences in the form and nature of their sovereignty makes it treacherous" to treat them as such. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). Moreover, the relationship between states and Indian tribes *is* defined by the Constitution, under which the states relinquished, without limitation, all authority over Indian affairs to the federal government. The settled rule is that "[t]he Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana v. Blackfeet Tribe*, 471 U.S. 759, 764 (1985) (citing *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974), and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832)); *Bryan v. Itasca County*, 426 U.S. 373, 376 n.2 (1976); *United States v. Mazurie*, 419 U.S. 544, 554 n.11 (1975); *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974); *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715-16 (1943). *See also Seminole Tribe of Florida v. Florida*, 517 U.S. ——, 134 L.Ed.2d 252, 276-77 (1996).

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[7] The ruling is expressly limited to tort claims arising out of traffic accidents. The Court noted "[w]e have no occasion, in this case, to consider whether different state policies, . . . might require a different analysis or a different result." *Nevada v. Hall*, 440 U.S. at 424 n.24. This Court has not since expanded its holding beyond that scope.

The importance of exclusive federal control over Indian affairs became apparent from the time of the Articles of Confederation. The Articles had imposed two limitations on the power of Congress over Indian affairs—"the Indians must not be members of any State, nor must Congress do anything to violate or infringe the legislative right of a State within its own limits." *United States v. Forty-Three Gallons of Whiskey*, 93 U.S. 188, 194 (1876); Art. 9 *Journals of the Continental Congress, 1774-1789*, IX, at 919 (Lib. of Cong. ed. 1904-1937). But these limitations led to disagreement. While the Continental Congress asserted exclusive power to deal with Indian tribes, a number of states disputed this view and independently dealt with Indian tribes. *Journals, supra, at* XXXIII, at 455, 460.

To resolve further controversy, the limitations contained in the Articles were omitted from the text of the Constitution. *See Forty-Three Gallons*, 93 U.S. at 194; *see* U.S. Const., Art. I, § 8, cl. 3. As this Court explained, the Framers recognized that those limitations "rendered the [federal] power of no practical value," and that "the only efficient way of dealing with the Indian Tribes was to place them under the protection of the General Government. Their peculiar habits and character required this . . ." *Forty-three Gallons*, 93 U.S. at 194; *accord, The Federalist No.* 42 at 284 (J. Cooke ed. 1961) (Madison, explaining that the Indian Commerce Clause was "properly unfettered from the two limitations contained in the articles of Confederation.") Thus, by the Constitution, "the whole power of regulating the intercourse with . . . [the Indians] was vested in the United States," *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560 (1832), as there could "be no divided authority" between the states and the national government in Indian affairs. *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 755 (1867). Congress' power to regulate commerce with Indians both within and outside Indian country was to be exclusive. *Forty-Three Gallons*, 93 U.S. at 194-95.

Having relinquished their authority over Indian affairs to the exclusive control of the federal government, the states lack any inherent authority to determine, as a matter of comity or by application of rules of state law, whether to recognize tribal sovereign immunity.[8] This Court's analysis in *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991), demonstrates that the comity principles of *Nevada v. Hall* cannot apply to Indian tribes:

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[8] For the same reason, the lower court erred in concluding that the state court has inherent jurisdiction to adjudicate a claim against an Indian *tribe*. Unlike the rules governing state jurisdiction over individual Indians off-reservation, federal law bars state court jurisdiction to adjudicate claims against an Indian tribe unless Congress has expressly granted such jurisdiction. *Bryan*, 426 U.S. at 388-89. While Congress can confer such power on the state courts, *see Parker v. Richard*, 250 U.S. 235, 239 (1919), it has not done so for the claims raised here. And the specificity with which Congress must speak is established by *Bryan*. Even where Congress had provided that certain states "shall have jurisdiction over civil causes of action between Indians or to which Indians are parties . . .," the statute did not confer any "state jurisdiction over the tribes themselves." 426 U.S. at 388-89. The absence of such statute here is fatal to the state court's assertion of jurisdiction over the tribe, and is all the more so without a waiver of tribal sovereign immunity.

Oklahoma Tax Comm'n v. Graham, 489 U.S. 838 (1989), is not to the contrary. The issue decided there was whether the complaint filed in state court raised a federal question that would permit removal of the action to federal court. This Court concluded that it did not, but stated that the tribe's immunity from suit might provide a federal defense to the claims. *Id.* at 840-41. In so ruling, however, this Court did not decide the merits of the immunity defense, nor the state court's jurisdiction over the tribe. Rather, like this Court's decisions in *National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co. v. LaPlante*, 480 U.S. 9 (1987), *Graham* addressed a matter of procedure under which the state courts, like tribal courts, are allowed "initially to respond to an invocation of their jurisdiction." *See Strate v. A-1 Contractors*, 65 U.S.L.W. 4298. 4301 (U.S. April 28, 1997). But the decision to allow another court to initially determine its own jurisdiction is not a ruling on the ultimate question of that court's "adjudicatory authority." *See id.*

> What makes the States' surrender of immunity from suit by sister States plausible is the mutuality of that concession. There is no such mutuality with . . . Indian tribes. We have repeatedly held that Indian tribes enjoy immunity against suits by States . . . as it would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.

Id. at 782 (citations omitted); *Idaho v. Coeur d'Alene Tribe*, 65 U.S.L.W. 4540, 4542 (U.S. June 23, 1997).[9]

B. Waivers of tribal sovereign immunity cannot be implied but must be unequivocally expressed.

Applying the same standard that governs waivers of the United States' sovereign immunity, and the States' Eleventh Amendment immunity, this Court consistently has held that a waiver of tribal immunity "'cannot be implied, but must be unequivocally expressed.'" *Santa Clara Pueblo*, 436 U.S. at 58-59 (citing *United States v. Testan*, 424 U.S. 392, 399 (1976), quoting *United States v. King*, 395 U.S. 1, 4 (1969)); *accord Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989). In the absence of an express waiver of sovereign immunity by the tribe or "'congressional authorization,' the 'Indian Nations are exempt from suit.'" *Santa Clara Pueblo*, 436 U.S. at 58 (quoting *Fidelity & Guaranty Co.*, 309 U.S. at 512); *Puyallup Tribe*, 433 U.S. at 172.

The requirement of an express waiver has been consistently applied. It has never depended on the nature of the activity underlying the claim. *See Santa Clara Pueblo*, 436 U.S. at 51-52 (civil rights); *Turner*, 248 U.S. at 357-58 (torts); *Fidelity & Guaranty Co.*, 309 U.S. at 510

[9] If the comity principles of *Nevada v. Hall* were deemed applicable, and allowed states to apply state law to determine the existence of a tribe's sovereign immunity, then those same comity principles would permit tribal courts to determine, as a matter of tribal law, whether a state retains its immunity from suit on like claims presented in tribal court.

(lease). It has applied equally to claims involving commercial transactions, as governmental functions, *Potawatomi*, 498 U.S. at 510, whether the claim is brought by a tribal member, *Santa Clara*, or a non-Indian, *Fidelity*, or a state, *Potawatomi*, and whether it is asserted in federal, *Santa Clara*, or state court. *Puyallup Tribe*, 433 U.S. at 172-73.

Nor has a tribe's sovereign immunity turned on the place where the transaction giving rise to the claim might be said to have occurred or its effects felt. To the contrary, this Court has applied the same fundamental principles and upheld tribal sovereign immunity from suits arising from tribal activities occurring *outside* the tribe's reservation, to the same extent as those arising within reservation boundaries. *Puyallup Tribe*, 433 U.S. at 172-73. The lower federal courts have done the same. Indeed, in contract actions such as this, the courts have resolved questions regarding tribal immunity by determining whether an act of the tribe or Congress expressly waived that immunity—not by undertaking to discern whether the situs of the contract is on- or off-reservation.[10] And the federal courts that have specifically addressed the question of a tribe's sovereign immunity to a suit arising from a commercial transaction occuring outside the reserva-

[10] *See, e.g., Rosebud Sioux v. Val-U Const. Co.*, 50 F.3d 560, 563 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 78 (1997); *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir.), *cert. denied*, 510 U.S. 1019 (1993); *McClendon v. United States*, 885 F.2d 627, 629-30 (9th Cir. 1989); *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1376-77 (8th Cir. 1985); *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1064, 1066 (1st Cir. 1979); *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966); *Thebo v. Choctaw Tribe*, 66 F. 372, 375-76 (8th Cir. 1895); *Adams v. Murphy*, 165 F. 304, 311-12 (8th Cir. 1908).

tion have concluded that immunity exists absent express tribal waiver.[11]

Congress is certainly "at liberty to dispense with such tribal immunity or to limit it" and has, in fact, authorized various classes of suits against Indian tribes.[12] But in so doing, Congress has been very careful to define the precise circumstances under which tribes may be sued, balancing the importance of immunity to the tribe's ability to carry out its governmental functions, against the need to accord a remedy to individuals who may be adversely affected by the exercise of those functions.[13] As a result, congressional waivers of tribal immunity have been limited in number and narrowly tailored,[14] with deference otherwise given to the tribe to make decisions on when and how to waive its immunity. *See Santa Clara Pueblo*, 436 U.S. at 58-72.

[11] *See Sac & Fox Nation v. Hanson*, 47 F.3d 1061, 1064-65 (10th Cir.), *cert. denied*, 116 S.Ct. 57 (1995); *Green v. Mt. Adams Furniture*, 980 F.2d 590, 598 (9th Cir. 1992), *cert. denied*, 510 U.S. 1039 (1994); *Frederico v. Capital Gaming Int'l Inc.*, 888 F. Supp. 354 (D.R.I. 1995); *Elliott v. Capital Investment Bank*, 870 F.Supp. 733 (E.D. Tex. 1994), *aff'd*, 102 F.3d 549 (5th Cir. 1996). *See also Maynard v. Naragansett Indian Tribe*, 984 F.2d 14 (1st Cir. 1993) (tribal sovereign immunity applies to actions arising within as well as without Indian country and barred a direct action against the tribe claiming trespass on lands outside of the reservation boundaries); *Haile v. Saunooke*, 246 F.2d 293 (4th Cir. 1957) (tribe did not lose its immunity by accepting a charter issued by the state).

[12] *See Potawatomi*, 498 U.S. at 510. Congress has authorized certain claims to be brought by tribal members and others against the tribe, *e.g.*, Appropriations Act of March 3, 1905, c. 1479, § 1, 33 Stat. 1048, 1071; *see The Cherokee Intermarriage Cases*, 203 U.S. 76 (1903); *Green v. Menominee Tribe*, 233 U.S. 558 (1914), and between different tribal groups. Act of July 22, 1958, Pub. L. No. 85-547, 72 Stat. 403; *see Healing v. Jones*, 210 F.Supp. 125 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963); Appropriations Act of March 3, 1883, c. 141, 22 Stat. 581, 585; *The Cherokee Trust Funds*, 117 U.S. 288 (1886). Congress has also authorized tribes to be joined in suits for adjudication of water rights. Act of July 10, 1952, c. 651, Title II, § 208(a)-(c), 66 Stat. 560, *codified at* 43 U.S.C. § 666; *see Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983).

[13] These factors were equally relevant to Congress' decision on whether to establish a federal cause of action to enforce the rights created by the Indian Civil Rights Act, 25 U.S.C. §§ 1301-1303. Considering the potential disruption that federal suits might have on the tribal government's ability to carry out its functions, Congress chose to limit the federal court remedies under the Act to habeas corpus, and otherwise deferred to the tribes to make appropriate decisions regarding the remedies to be provided in tribal forums. *Santa Clara Pueblo*, 436 U.S. at 58-72.

[14] For example, in the Indian Reorganization Act of 1934, 25 U.S.C. §§ 461 *et seq.*, Congress authorized tribes to adopt charters for the express purposes of engaging in business enterprises. 25 U.S.C. § 477. Some of those business charters include "sue and be sued" clauses waiving the entity's immunity from suit, although those charters may also expressly limit the assets from which a judgment may be satisfied. *See Maryland Casualty Co. v. Citizens Nat'l Bank of West Hollywood*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966). More recently, in the Indian Self-Determination Act of 1975, Congress effected a limited waiver of tribal sovereign immunity by requiring the maintenance of insurance in connection with work done under the act, and further directing that the insurance policy prohibit the insurer from asserting the tribe's immunity as a defense to a claim covered by the policy. 25 U.S.C. § 450f(c)(3)(A). In addition, some federal agencies have required waivers of tribal sovereign immunity as a condition of participation in the program. *See Weeks Const. Co. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 671 n.2 (8th Cir. 1986) (Department of Housing and Urban Development).

C. Congress has not waived tribal immunity, and no such waiver can be implied without undermining tribal sovereignty and federal law and policy for tribal self-determination and economic development.

Congress has *not* chosen to abrogate tribal immunity for the kind of claim raised here. To the contrary, Congress has "consistently reiterated its approval of the immunity doctrine," *Potawatomi*, 498 U.S. at 510, in terms that do not permit the existence of a tribe's immunity to

turn on whether aspects of a transaction might be said to have occurred within or outside Indian country.

Significantly, Congress reaffirmed tribal sovereign immunity in the Indian Self-Determination and Education Assistance Act of 1975, 25 U.S.C. §§ 450, 450n(*l*),[15] which is one among many federal statutes intended to promote " 'Indian self-government, including its "overriding goal" of encouraging tribal self-sufficienty and economic development.' " *Potawatomi,* 498 U.S. at 510 (quoting *California v. Cabazon Band of Mission Indians,* 480 U.S. 202, 216 (1987)); *New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 334-35, & n.17 (1983). Moreover, as reflected by the federal statutes enacted to carry out these policies, Congress has understood that tribal self-determination and economic development cannot be accomplished exclusively within Indian country.[16] In-

[15] The Self-Determination Act recites that "[n]othing in this Act shall be construed as . . . affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe." 25 U.S.C. § 450n(*l*). Tribal sovereign immunity was more recently affirmed by Congress in the American Indian Agricultural Resource Management Act of 1993, 25 U.S.C. § 3746.

[16] Congress has historically recognized that Indian commerce is not and cannot be confined to the reservation boundaries. This is illustrated by the federal Indian trader statutes, 25 U.S.C. §§ 261-264, and their application to nonresident vendors, *see Central Machinery Co. v. Arizona Tax Comm'n,* 448 U.S. 160, 165 (1980). It is also illustrated by the Non-Intercourse Act, 25 U.S.C. § 177, and the federal statutes regulating liquor trade with Indians both within and outside Indian country, *see Dick v. United States,* 208 U.S. 340 (1908); *United States v. Forty-Three Gallons of Whiskey,* 93 U.S. 188, 194 (1876). It is further reflected by the treaties reserving Indian rights to hunt and fish outside the reservation boundaries, *Antoine v. Washington,* 420 U.S. 194 (1975), the exercise of which is regulated and managed by the tribes outside the reservation. *See, e.g., Settler v. Lameer,* 507 F.2d 231, 237-38 (9th Cir. 1974); *United States v. Washington,* 520 F.2d 676, 686 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976); *Lac Courte Oreilles Band v. Wisconsin,* 668 F.Supp. 1233, 1241-42 (W.D.Wis. 1987); *United States v. Michigan,* 471 F.Supp. 192, 273 (W.D. Mich. 1979).

deed, many provisions of these statutes contemplate that the tribe provide services, operate programs and engage in enterprises both within and outside the reservation boundaries. For example, the Indian Financing Act, 25 U.S.C. § 1521, provides federal grants to tribes and individual Indians "to establish and expand profit making Indian owned enterprises on or near reservations." The Indian Child Welfare Act, 25 U.S.C. §§ 1931-1933, authorizes federal grants for the establishment and operation of Indian child and family service programs both on and off reservation. And by the Indian Health Care Improvement Act, 25 U.S.C. §§ 1601, 1603(c), (m), tribes are to provide health care services to all Indians living on or near the reservation, within a federally defined service area. Consistent with these statutes, and the reality that the contracts made by tribes under authority of the Self-Determination Act will often involve parties and activities outside the boundaries of the reservation, Congress reaffirmed tribal sovereign immunity without geographic limitation.[17]

Sovereign immunity, and the right to decide when and how to waive that immunity, are critical components of tribal self-determination and economic development. The principle of sovereign immunity recognizes that no government can fulfill its obligations to its citizenry while also defending itself against any and all litigants in a judicial forum. Sovereign immunity—for any government

[17] While reaffirming tribal sovereign immunity, Congress also provided remedies for claims that might be made against tribal employees or contractors carrying out the Self-Determination Act contracts. Specifically, Congress extended the Federal Tort Claims Act to cover such claims. The FTCA is available to the same extent as it applies to the United States—without regard to whether the claimed wrong occurred within or outside the reservation. Act of November 5, 1990, Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1959, as amended by Act of November 11, 1993, Pub. L. No. 103-138, Title III, § 308, 107 Stat. 1416, reprinted following 25 U.S.C.S. § 450f (1995).

—protects government resources necessary for public services from loss through litigation. Such threats, while applicable to all sovereigns, have been held to be especially severe for Indian tribes whose limited resources and considerable unmet needs make them all the more vulnerable to the impact of lawsuits to which they have not consented nor planned. *Thebo v. Choctaw Tribe*, 66 F. 372, 375-76 (8th Cir. 1895); *Fidelity & Guaranty Co.*, 309 U.S. at 512-13; *Chemehuevi Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1051 (9th Cir.), *rev'd on other grounds*, 474 U.S. 9 (1985). *See also Santa Clara Pueblo*, 436 U.S. at 64-65 & n.19, 67. The embedded conditions of poverty confronting Indian tribes [18] can only be remedied by a dedicated long term commitment to their eradication. This cannot be done if tribes are subject to unlimited demands by litigants, and certainly not if they are denied the right to make their own decisions on when and how to waive their immunity—rights possessed by the federal and state governments with parallel responsibilities and much greater resources.

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[18] These problems persist. As recently found by Congress, "the unmet health needs of the American Indian people are severe" with the health status of Indians "far below that of the general population of the United States . . . ." Indian Health Care Improvements Act of 1976, as amended in 1992, 25 U.S.C. § 1601(d). The same is true in the areas of Indian education and employment. Considering data on school drop-out rates and levels of educational attainment, Congress found that Indian people continue to confront serious problems in education, many of which are tied to "the high incidence of poverty, unemployment, and health problems among Indian children and their families." Improving America's Schools Act of 1994, 20 U.S.C §§ 7801(4), (5), 7802(a); *see also* Indian Employment, Training and Related Services Demonstration Act of 1992, 25 U.S.C. § 3401. Congress has also recently found "the need for affordable homes in safe and healthy environments on Indian reservations, [and] in Indian communities" is "acute." Native American Housing Assistance and Self-Determination Act of 1996, Pub. L. No. 104-330, § 2(6), 110 Stat. 4018.

II. FEDERAL LAW DOES NOT PERMIT THE LOWER COURT'S TEST UNDER WHICH THE EXISTENCE OF A TRIBE'S SOVEREIGN IMMUNITY TURNS ON WHETHER SOME ASPECT OF THE TRANSACTION OCCURS ON OR OFF RESERVATION.

A. A damages action against a tribe is per se an action against the tribe on the reservation.

The operation of a tribal government cannot survive the uncertainty of a rule that would make a tribe's immunity from suit turn on whether the transaction may have occurred within or outside Indian country.[19] A damages action brought against a tribe that has not consented to suit has a direct and immediate effect on the reser-

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[19] This Court's decision in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), does not support the off-reservation distinction that the Court below made. In relying on that decision the Court below confused the rules regarding the applicability of substantive law to a tribe's off-reservation activities with the rules that control governmental immunity. The two are different. The availability of a sovereign's immunity from suit does not turn on whether the sovereign's actions were proper under substantive law. *See Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Puerto Rico Aqueduct v. Metcalf & Eddy*, 506 U.S. 139, 145-46 (1993). Immunity is not a defense on the merits, but the right of a sovereign not to be subjected " 'to the coercive process of judicial tribunals at the instance of private parties.' " *Seminole Tribe of Florida*, 517 U.S. at ——, 134 L.Ed. 2d at 268 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146). The difference between the applicability of state substantive law to tribal activities occurring off-reservation and a tribe's sovereign immunity from suit is illustrated by this Court's decisions in *Citizen Band of Potawatomi* and *Santa Clara Pueblo*. Although the Court in *Potawatomi* found that the tribe was legally obligated to collect state excise taxes from its non-Indian purchasers, 498 U.S. at 512-13, the tribe's sovereign immunity from suit barred the state from asserting a counterclaim against the tribe to recover the tax. *Id.* at 509-10. The same distinction was recognized in *Santa Clara Pueblo*, where the Indian Civil Rights Act changed the substantive law applicable to Indian tribes, 436 U.S. at 57-58, but the statute did not implicitly abrogate the tribe's immunity from suit. *Id.* at 58-59.

vation and the tribe's sovereign functions. The threat to tribal sovereignty is the same whether the contract is deemed to be on- or off-reservation. This is clearly illustrated by the facts in related proceedings in this case where, at the behest of a private party, a judgment entered on a note given to an off-reservation lender has been enforced by the seizure of tribal assets off-reservation, including tribal tax revenues due from lessees of reservation property, with the tribe enjoined from enforcing its tax laws to foreclose on tax liens created by failure to pay the tax.[20] While the underlying claim involved a transaction denominated as off-reservation, its effects on the tribe's governmental resources and sovereignty make it the "functional equivalent" of a suit against the tribe on the reservation. *See Idaho v. Coeur d'Alene Tribe,* 65 U.S.L.W. 4540, 4546 (U.S. June 23, 1997); *id.* at 4548 (O'Connor, J., concurring). The practical effects of the unconsented-to litigation require that the sovereign's immunity be upheld to protect the sovereign interests. *See id.*

B. The lower Court's test would obviate the protections intended by immunity and impermissibly condition the tribe's access to off-reservation resources on a waiver of its immunity.

If the question of a tribe's sovereign immunity is to be decided by the state courts under the approach used by the courts in Oklahoma, the threat to tribal self-determination and economic self-sufficiency presented is all the more severe. Under that test, a tribe can be haled into state court by any person simply upon an allegation that some aspect of a contractual relation with the tribe is commercial and occurred outside of Indian country. As the states' laws governing the situs of contracts and business transactions do not lend themselves to a single set of rules that are uniformly applied with any pre-

[20] *See* Pet. App. at 8, 10, *Kiowa Indian Tribe of Oklahoma v. Hoover,* Civ. 98-843-C (W.D.Okla. Nov. 1996).

dictable result,[21] any event occurring outside Indian country may be alleged as a basis for abrogating tribal immunity and subjecting the tribe to suit in state court. Whether or not there is merit to the allegation, the tribe will be compelled to appear and defend. If it does not do so, the tribe faces default judgment, followed by the likely threat of attachment of tribal funds, which for many tribes are necessarily held in banks outside the reservation. The result will be a proliferation of state court actions against Indian tribes in which even an express reservation of tribal sovereign immunity, as in this case, may be irrelevant to the analysis. And by engrafting state law rules governing situs of contracts onto a test for determining tribal immunity, the very purposes of that immunity—the sovereign's right to avoid the costs and burden of litigation—will be effectively and irrevocably lost. *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985). The cost of defending these actions will "impose serious financial burdens on already 'financially disadvantaged' tribes," burdens that

[21] The situs of a contract for purposes of jurisdiction and choice of law principles can turn on a variety of often competing factors, the balancing of which is left to the discretion of the court. For example, in a suit to recover on a promissory note made in connection with a purchase of securities, the situs of the claim can be affected by: the express terms of the contract, the place where it was executed, the place of payment, the location of the security interest, whether the agreement constituted a negotiable or non-negotiable instrument, and whether another sovereign has greater ties to the transaction. *See Restatement (Second) of Conflict of Laws,* §§ 6, 188, 195 (1971); Goodrich & Scoles, *Conflict of Laws,* 319-20 (4th ed. 1964). The outcome of the analysis may also turn on the cause of action pled, with differing conclusions if the suit is one to recover on the collateral, as opposed to a claim against the debtor for a judgment in damages. *See Restatement (Second) of Conflict of Laws,* §§ 56, 61, 66, 67, 68 (1971). The issues are further complicated by the need to decide whether the tribal activity at issue is commercial or governmental in nature—distinctions which, as this Court has found in other contexts, are "inherently unsound" and lead to "inevitable chaos." *Indian Towing Co. v. United States,* 350 U.S. 61, 65 (1955).

many tribes can "ill afford to shoulder," *Santa Clara Pueblo*, 436 U.S. at 64-65 & n.19, and which will most certainly divert limited tribal resources from funding schools and hospitals to paying legal fees.

Moreover, the lower Court's test would accomplish what was clearly prohibited by this Court's decision in *Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890 (1986). The state will be able to condition a tribe's ability to obtain financing, goods, and services that are not available from any source within Indian country on a waiver of the tribe's sovereign immunity from suit and submission to rules of state law. When North Dakota attempted to do this by a state statute that conditioned the tribe's access to the state courts on a waiver of the tribe's sovereign immunity for *all* civil actions brought in the state courts and on which state civil law would control, this Court held the statute barred by federal law. As the Court found, the state's condition could be "met only at an unacceptably high price to tribal sovereignty," *id.* at 889, which was "unduly intrusive of the Tribe's common law sovereign immunity," and "a potentially severe impairment of the authority of the tribal government, its tribal courts and its laws." *Id.* at 891. The same is true here. A tribe's access to essential goods and services cannot be conditioned on a rule of law that coerces a waiver of the tribe's immunity as the price for acquiring those goods.

III. THE EXISTING FEDERAL RULES GOVERNING TRIBAL IMMUNITY PROVIDE CLEAR STANDARDS UNDER WHICH PERSONS SEEKING TO DO BUSINESS WITH INDIAN TRIBES CAN SECURE ENFORCEABLE REMEDIES.

There is no need for a radical change in the test governing tribal sovereign immunity with regard to contracts that might be said to have off-reservation attributes or effects. To the contrary, contracts are the vehicle best

suited to give effect to established federal law rules for waiver of tribal immunity.

" 'Tribes and persons dealing with them long have known how to waive sovereign immunity when they so wish.' " *McClendon v. United States*, 885 F.2d 627, 631 (9th Cir. 1989) (quoting *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379 (8th Cir. 1985)). One who seeks to do business with an Indian tribe can negotiate the terms on which that will be done, including the terms governing remedies for breach. *See Sac & Fox Nation v. Hanson*, 47 F.3d at 1065. Provision for a waiver of sovereign immunity can be made in the text of the contract. Whether to include such provision as well as its scope lie wholly within the control of the contracting parties to be resolved in the context of negotiation. In the event that the tribe is unwilling to agree upon terms for such remedies, the other party is free to refuse to do business with the tribe. Remedies, including waivers of tribal immunity, do exist, have been agreed upon by the tribes, and enforced by the courts.[22] In this case, of course,

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[22] *See, e.g., Sokaogon Gaming Enterprises v. Tushie Montgomery Assoc.*, 86 F.3d 656 (7th Cir. 1996) (waiver of immunity to enforce contract's arbitration clause); *Rosebud Sioux v. Val-U Const. Co.*, 50 F.3d 560, 562-63 (8th Cir. 1995), *cert. denied*, 116 S.Ct. 78 (1997) (waiver of immunity contained in contract with off-reservation construction company; *Altheimer & Gray v. Sioux Mfg. Corp.*, 983 F.2d 803, 812 (7th Cir. 1993), *cert. denied*, 510 U.S. 1019 (1995) (express waiver of immunity from suit contained in tribal corporation's charter, and confirmed in the contracts under which the suit was brought); *Weeks Const. Co. v. Oglala Sioux Housing Auth.*, 797 F.2d 668, 671 (8th Cir. 1986) (waiver of immunity in charter of tribal housing authority); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537, 540 (10th Cir. 1980), *aff'd on other grounds*, 455 U.S. 130 (1982) (tribal council adopted resolution waiving immunity from suit); *Maryland Casualty Co. v. Citizens National Bank of West Hollywood*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966) (waiver of immunity in tribal corporation's charter but limiting the remedies available

the Tribe expressly preserved its immunity from suit, and that governmental decision, which respondent accepted, should be respected.

The Court below is trying to protect a party who was free to avail himself of the tools that existing law provides. The Court's objective does not warrant a wholesale revision of established federal Indian law, and most certainly does not justify the test that the Oklahoma courts have applied. If there is any real need to make distinctions between a tribe's sovereign immunity with regard to activities occurring outside Indian country, that should be done by Congress pursuant to a law that will define precisely how and when it will apply.

CONCLUSION

The judgment of the Oklahoma Court of Appeals should be reversed.

Respectfully submitted,

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for enforcement); *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143, 147 (8th Cir. 1970).